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DPG v LAMG

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HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO PA-24F-93–09 OF 2024
AZIZAN MD ARSHAD J
23 JUNE 2025

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Family Law — Children — Custody — Plaintiff-husband filed application for sole custody, care, and control of children — Defendant-wife filed application to annul and set aside interim order that was decided before — Parties and children were not Malaysian citizens, only habitual residents in Malaysia — Whether court had jurisdiction to hear matter — Whether custody, care and control should be granted to plaintiff — Whether ex parte interim order was procedurally regular and valid — Whether defendant's application to annul and set aside interim order should be allowed

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This was an application by the plaintiff-husband for sole custody, care, and control of the children, namely Child A and Child B. The marriage between the parties had irretrievably broken down, and the plaintiff intended to initiate divorce proceedings against the defendant-wife. The plaintiff's application for sole custody, care, and control of the children initially arose from the defendant's unlawful actions in forcibly removing and abducting the children from their habitual residence in Malaysia and taking them to Canada on 7 May 2024. Despite the plaintiff's repeated requests and/or appeals for the return of the children to Penang, the defendant had persistently and unequivocally refused to comply. Following an extensive legal process in Canada, the children were ultimately returned to their home in Penang after the Supreme Court of British Columbia found and determined, among other things, that: (a) the defendant had wrongfully removed the children from Malaysia and brought them to Canada and that she has wrongfully retained the children in Canada since that time; and (b) the children were not habitually resident in Canada and that they were habitually resident in Malaysia. Subsequently, on 8 September 2024, the plaintiff brought the children back to Malaysia, where they had since been under the exclusive care of the plaintiff. The plaintiff's application for temporary or interim custody, care, and control of the children was granted by the High Court with reasonable access to the defendant was allowed. Thereafter, parties came to terms and recorded an interim consent order in which the access period to the defendant was extended. Due to concerns regarding potential further abductions and the wrongful removal of the children from their lives in Malaysia, the plaintiff submitted this application and sought, among other things, sole custody, care, and control to him ('encl 1'). Among the reasons given was that: (i) the defendant was deemed an

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irresponsible and unfit mother; and (ii) the welfare and proper upbringing of the children were best ensured in Malaysia. The defendant submitted that the court did not have jurisdiction to hear and determine this matter as the parties were all foreign nationals ie Canadian citizens and not Malaysian citizens. The defendant then also applied to annul the interim order that was decided before ('encl 27'). The defendant raised that the interim order was irregular on the basis that the ex parte that was entered against the defendant on an ex parte basis without an inter-parte hearing being conducted within 14 days, as provided under O 29 r 1(2BA) of the Rules of Court 2012 ('the ROC').

Held:

(1) Given that there were no divorce proceedings pending in the court and that the matter did not pertain to citizenship issues, but solely to the welfare of the children, the court would refrain from making a jurisdictional decision based on domicile. Instead, the decision would be based on the physical presence of the children currently residing in Malaysia. The court's order was given based on the welfare of the children by considering the fact of the suitability of the parents for the time being while they were in Malaysia. The court was not making any concluded decision as to which parent should have permanent exclusive custody of the children as it was a matter for the Canadian Courts (see paras 34–37).

(2) The consideration of the welfare of the children was recognised to be best placed with the plaintiff in Penang. The legal presumption under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') clearly prioritised the mother in custody matters, unless there was strong evidence to the contrary. Since it was established that Child A was over the age of seven years old thus rebuttable presumption did not apply. The plaintiff had successfully proven that the plaintiff was best suited to care for Child B. Both Child A and Child B would be best placed with the care and custody of the plaintiff considering the undesirability of disturbing a child's life by custody changes, that they had been well looked after by their father and the defendant's situation of not having a place to live and having any employment in Malaysia (see paras 43 & 52–53).

(3) The argument that the court order granted was injunctive under O 29 of the ROC was incorrect because the injunction granted was not an order under O 29 of the ROC, but an order under s 89 of the LRA which allowed the court to impose conditions on the access. On top of that, this issue could no longer be raised when an interim order had been recorded by agreement by both parties, so the issue of whether it was an injunction obtained under O 29 of the ROC had become no longer relevant. There was no ambiguity or prejudice against the defendant, the defendant had effectively answered each affidavit in this application and had vigorously contested the plaintiff's affidavit (see paras 61–62 & 65).

(4) Given that encl 1 had been decided inter parte, the application for encl 27 to annul and set aside the ex parte order granted had become academic and redundant. Both parties had thoroughly articulated and presented the substantive arguments related to the application as detailed in encl 1. Consequently, encl 27 was struck out with no order as to costs (see paras 69 & 71).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif-suami bagi hak jagaan, peliharaan, dan kawalan tunggal ke atas anak-anak, iaitu Kanak-kanak A dan Kanak-kanak B. Perkahwinan antara pihak-pihak telah retak tidak dapat dipulihkan, dan plaintif berhasrat untuk memulakan prosiding perceraian terhadap defendan-isteri. Permohonan plaintif bagi hak jagaan, peliharaan, dan kawalan tunggal ke atas anak-anak pada awalnya timbul daripada tindakan menyalahi undang-undang defendan yang membawa lari dan menculik anak-anak secara paksa dari tempat kediaman lazim mereka di Malaysia serta membawa mereka ke Kanada pada 7 Mei 2024. Meskipun permintaan dan/atau rayuan berulang plaintif untuk pengembalian anak-anak ke Pulau Pinang, defendan enggan mematuhinya secara berterusan dan jelas. Berikutan proses undang-undang yang meluas di Kanada, anak-anak akhirnya dikembalikan ke rumah mereka di Pulau Pinang setelah Mahkamah Agung British Columbia mendapati dan memutuskan, antara lain, bahawa: (a) defendan telah membawa keluar anak-anak secara salah dari Malaysia dan membawa mereka ke Kanada, serta telah menahan anak-anak secara salah di Kanada sejak masa itu; dan (b) anak-anak bukan penduduk lazim Kanada dan sebaliknya, mereka penduduk lazim Malaysia. Selanjutnya, pada 8 September 2024, plaintif membawa anak-anak kembali ke Malaysia, di mana mereka telah berada di bawah jagaan eksklusif plaintif sejak itu. Permohonan plaintif bagi hak jagaan, peliharaan, dan kawalan interim ke atas anak-anak telah dibenarkan oleh Mahkamah Tinggi, dengan akses munasabah kepada defendan dibenarkan. Selepas itu, pihak-pihak mencapai persetujuan dan merekodkan perintah persetujuan interim di mana tempoh akses defendan dilanjutkan. Oleh kerana kebimbangan mengenai potensi penculikan lanjut dan pengeluaran anak-anak secara salah dari kehidupan mereka di Malaysia, plaintif mengemukakan permohonan ini dan memohon, antara lain, hak jagaan, peliharaan, dan kawalan kepadanya ('lampiran 1'). Antara sebab yang diberikan ialah: (i) defendan dianggap sebagai ibu yang tidak bertanggungjawab dan tidak layak; dan (ii) kebajikan serta asuhan yang sewajarnya bagi anak-anak paling terjamin di Malaysia. Defendan mengemukakan bahawa mahkamah tidak mempunyai bidang kuasa untuk mendengar dan memutuskan perkara ini kerana semua pihak adalah warga asing, iaitu warganegara Kanada dan bukan warganegara Malaysia. Defendan kemudian turut memohon untuk membatalkan perintah interim yang telah diputuskan sebelum ini ('lampiran 27'). Defendan membangkitkan bahawa perintah interim itu tidak teratur atas dasar bahawa perintah ex parte yang dikeluarkan terhadap defendan itu dibuat

secara ex parte tanpa pendengaran inter-parte dijalankan dalam tempoh 14 hari, sebagaimana yang diperuntukkan di bawah A 29 k 1(2BA) Kaedah-Kaedah Mahkamah 2012 ('KKM').

Diputuskan:

(1) Memandangkan tiada prosiding perceraian yang belum selesai di mahkamah dan perkara itu tidak berkaitan dengan isu kewarganegaraan, tetapi semata-mata dengan kebajikan anak-anak, mahkamah akan menahan daripada membuat keputusan bidang kuasa berdasarkan domisil. Sebaliknya, keputusan akan berdasarkan kehadiran fizikal anak-anak yang kini menetap di Malaysia. Perintah mahkamah diberikan berdasarkan kebajikan anak-anak dengan mengambil kira kesesuaian ibu bapa buat masa ini semasa mereka berada di Malaysia. Mahkamah tidak membuat sebarang keputusan muktamad mengenai ibu bapa mana yang patut mempunyai hak jagaan, peliharaan, dan kawalan eksklusif kekal ke atas anak-anak kerana ia adalah perkara untuk Mahkamah Kanada (lihat perenggan 34–37).

(2) Pertimbangan kebajikan anak-anak diiktiraf sebagai paling baik diletakkan di bawah jagaan plaintif di Pulau Pinang. Anggapan undang-undang di bawah s 88(3) Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 ('LRA') jelas mengutamakan ibu dalam hal jagaan, peliharaan, dan kawalan, melainkan terdapat bukti kukuh yang sebaliknya. Memandangkan telah dibuktikan bahawa Kanak-kanak A berusia lebih daripada tujuh tahun, maka anggapan yang boleh disangkal tidak terpakai. Plaintif telah berjaya membuktikan bahawa plaintif paling sesuai untuk menjaga Kanak-kanak B. Kanak-kanak A dan Kanak-kanak B akan paling baik diletakkan di bawah jagaan, peliharaan, dan kawalan plaintif dengan mengambil kira ketidakinginan untuk mengganggu kehidupan seorang kanak-kanak oleh perubahan jagaan, bahawa mereka telah dijaga dengan baik oleh bapa mereka, dan situasi defendan yang tiada tempat tinggal serta tiada pekerjaan di Malaysia (lihat perenggan 43 & 52–53).

(3) Hujah bahawa perintah mahkamah yang diberikan adalah injunksi di bawah A 29 KKM adalah tidak tepat kerana injunksi yang diberikan bukanlah perintah di bawah A 29 KKM, tetapi perintah di bawah s 89 LRA yang membenarkan mahkamah mengenakan syarat ke atas akses. Selain itu, isu ini tidak lagi boleh dibangkitkan apabila perintah interim telah direkodkan melalui persetujuan kedua-dua pihak, maka isu sama ada ia adalah injunksi yang diperoleh di bawah A 29 KKM telah menjadi tidak lagi relevan. Tiada kekaburan atau prejudis terhadap defendan, defendan telah menjawab setiap afidavit dalam permohonan ini dan telah membantah afidavit plaintif dengan bersungguh-sungguh (lihat perenggan 61–62 & 65).

(4) Memandangkan lampiran 1 telah diputuskan secara inter parte, permohonan lampiran 27 untuk membatalkan dan mengetepikan perintah ex parte yang diberikan telah menjadi akademik dan berlebihan. Kedua-dua pihak telah mengemukakan dan membentangkan hujah substantif berkaitan permohonan secara terperinci dalam lampiran 1. Akibatnya, lampiran 27 telah dibatalkan tanpa sebarang perintah mengenai kos (lihat perenggan 69–71).]

Cases referred to

Ang Paik Leng lwn Tan Kean Leong [2022] MLJU 2615; [2022] CLJU 2397, HC (folld)
Celvambigai a/p S Thirucelvam v Pandian a/l Subramaniam [2015] MLJU 2093; [2015] 6 CLJ 225, HC (refd)
Foo Kok Soon v Leony Rosalina [1998] MLJU 61 ; [1998] 4 CLJ Supp 289, HC (refd)
Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners) [2006] 6 MLJ 372, HC (refd)
Kerajaan Malaysia v Gold Bridge Engineering & Construction Sdn Bhd [2022] MLJU 3075, HC (refd)
Khoo Cheng Nee v Lubin Chiew Pau Sing [1996] 4 MLJ 171, HC (refd)
Lee Chown Yee v Wong Mei Lin (P) [2016] MLJU 661, HC (refd)
Melissa Marie Albert v Malcolm Fernandez and another appeal [2019] 2 MLJ 290; [2019] 8 CLJ 181, CA (refd)
Nanthini a/p Subramaniam lwn Eric Steven a/l Mathalai Muthu [2025] MLJU 772, HC (refd)
Neduncheliyan Balasubramniam v Kohila a/p Shanmugam [1997] 3 MLJ 768, CA (folld)
Raphel Pura v Insas Sdn Bhd & Anor [2003] 1 MLJ 513, FC (refd)
Teh Chern Zhe lwn Alisha Gilbert Sulin [2024] MLJU 2355; [2024] CLJU 2058, HC (refd)
Thanaletchimy a/p Batamallai v Vijaya Kumar a/l Kassinathan [2018] 4 MLJ 557; [2018] 8 CLJ 24, CA (refd)
Valarmathy a/p Devarajoo v Selvaveeran a/l Manokaran [2021] MLJU 1098, HC (refd)
Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals [2016] 1 MLJ 585; [2016] 3 CLJ 505, FC (refd)
W v H [1987] 2 MLJ 235 (refd)
Winnie Ong Beng Cheen v Cheah Chyuan Yong & Anor (Lee Lean Hiap, third party) [2025] MLJU 550; [2025] CLJU 461, HC (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 rr 7(1), 104
Federal Constitution art 121(1A)
Guardianship of Infants Act 1961 ss 1(3), 5, 11
Law Reform (Marriage and Divorce) Act 1976 ss 3, 3(1), 88, 88(3), 89

Rules of Court 2012 O 29, O 29 r 1(2B), (2BA), O 32 r 6, O 92 r 3B

Eric Aloysius Augustin (YC Wong) for the plaintiff.
Chan Szu Fu Chan (De Vries & Co) for the defendant.

Azizan Md Arshad J:

INTRODUCTION

[1] This is an application by the plaintiff-husband for sole custody, care, and control of the children, namely Child A and Child B. The marriage between the parties has irretrievably broken down, and the applicant intends to initiate divorce proceedings against the defendant-wife.

[2] This court has heard and reviewed the applications (encls 1 and 27) and is satisfied that it has the necessary jurisdiction to adjudicate both encls. While it is acknowledged that the parties and the children are not Malaysian citizens, the children are, at all material times, habitual residents in Malaysia. The basis for this jurisdiction will be further elaborated in the subsequent paragraphs.

[3] The defendant, being dissatisfied with the decision in encl 1 and encl 27, has since filed an appeal (notice of appeal(s) dated 18 June 2025) against the said decision (delivered on 11 June 2025). This ground of judgment was prepared simultaneously to effectively address both appeals and for the purpose of this judgment, the parties shall be referred to as they were in the High Court.

FACTS

[4] The plaintiff's application for sole custody, care, and control of the children initially arose from the defendant's unlawful actions in forcibly removing and abducting the children from their habitual residence in Malaysia and taking them to Canada on 7 May 2024.

[5] Despite the plaintiff's repeated requests and/or appeals for the return of the children to Penang, the defendant has persistently and unequivocally refused to comply.

[6] Following an extensive legal process in Canada, the children were ultimately returned to their home in Penang, Malaysia, after the Supreme Court of British Columbia found and determined, among other things, that:

(a) the defendant had wrongfully removed the children from Malaysia and brought them to Canada on or about 7 May 2024, and that she has wrongfully retained the children in Canada since that time; and

(b) the children are not habitually resident in Canada and that they are habitually resident in Malaysia.

[7] Following a period of four months marked by separation and abduction, the children were reunited with the plaintiff. Subsequently, on 8 September 2024, the plaintiff brought the children back to Malaysia, where they have since been under the exclusive care of the plaintiff.

[8] Due to the aforementioned abduction, intolerable conduct, and mistreatment of the defendant, the marriage has irreparably deteriorated, and the plaintiff plans to commence divorce proceedings against the defendant (which at the material time, no divorce proceeding was filed).

[9] The previously mentioned abduction was brought forth and submitted to this court in the plaintiffs application for temporary or interim custody, care, and control of the children (encl 4).

[10] This application was duly granted by this court through the High Court order dated 13 September 2024 (encl 8), which granted interim custody, care, and control of the children to the plaintiff, while allowing reasonable access to the respondent every Saturday from 3pm to 6pm. Further, on 21 March 2025 (encl 33), parties came to terms and recorded an interim consent order in which the access period to the defendant was extended in which the defendant will be given access from 4pm on a Friday until 9:45am on a Sunday ('overnight access').

[11] Due to concerns regarding potential further abductions and the wrongful removal of the children from their lives in Malaysia, the plaintiff submits this application and respectfully requests this court to grant, among other things, sole custody, care, and control to him.

[12] Among the reasons given (which is denied by the defendant) is that the defendant is deemed an irresponsible and unfit mother. Most importantly, the welfare and proper upbringing of the children are best ensured here in Malaysia. The children should ideally be placed under the care, custody, and control of the plaintiff, allowing them to continue their lives here in Penang, while the defendant is granted reasonable access to the children.

PROCEEDINGS

[13] The applications that have been submitted are detailed below:

(a) plaintiff's application for sole custody, care and control of the children of the marriage (encl 1) in the following prayers:

(a) bahawa penjagaan, pemeliharaan dan kawalan kanak-kanak yang bernama Child A, umur 7 tahun yang dilahirkan pada 08.04.2017 diberikan kepada Plaintif sahaja sehingga perintah Mahkamah selanjutnya;

[(a) that the custody, care and control of the child named Child A, aged 7 years born on 08.04.2017 be granted to the Plaintiff only until further order of the Court];

(b) penjagaan, pemeliharaan dan kawalan kanak-kanak yang bernama Child B, umur 4 tahun yang dilahirkan pada 06.08.2020 diberikan kepada Plaintif sahaja sehingga perintah Mahkamah selanjutnya;

[(b) that the custody, care and control of the child named Child B, aged 4 years born on 06.08.2020 be granted to the Plaintiff only until further order of the Court];

(c) bahawa Defendan dilarang untuk menggangu hak Plaintif dalam penjagaan, pemeliharaan dan kawalan kanak-kanak, Child A and Child B sehingga perintah Mahkamah selanjutnya;

[(c) that the Defendant is prohibited from interfering with the Plaintiffs right to the custody, care and control of the children, Child A and Child B until further order of the Court];

(d) bahawa Defendan diberikan hak akses yang dipantau pada setiap hari Sabtu pukul 3 petang hingga 6 petang sahaja untuk melawat Child A dan Child B, di tempat awam, sehingga perintah Mahkamah selanjutnya;

[(d) that the Defendant is granted supervised access every Saturday from 3pm to 6pm only to visit Child A and Child B, in a public place, until further order of the Court];

(e) bahawa Defendan dilarang untuk mendekati Plaintif dan kanak-kanak Child A and Child B dalam lingkungan 15 meter, kecuali untuk keperluan akses yang dipantau sebagaimana yang dimaksud dalam permohonan (e) di atas;

[(e) that the Defendant is prohibited from approaching the Plaintiff and the children Child A and Child B within 15 metres, except for the purpose of supervised access as referred to in application (e) above[;

(f) kos; dan

[(f) costs; and]

(g) relif-relif atau perintah-perintah yang dianggap sesuai dan berpatutan oleh Mahkamah yang Mulia ini.

[(g) such reliefs or orders as this Honourable Court may deem fit and proper.]

(b) defendant's application for a declaration that the ex parte order dated 13 September 2024 is null and void or to set aside the ex parte order dated 13 September 2024 as follows:

(1) Perintah Ex-Parte bertarikh 13.09.2024 yang diperoleh oleh Plaintif

berkaitan hak penjagaan sementara anak-anak Child A dan Child B dibatalkan sepenuhnya;

[(1) The Ex-Parte Order dated 13.09.2024 obtained by the Plaintiff in respect of the interim custody of the children Child A and Child B be set aside in its entirely];

(2) Semua arahan dan/atau sekatan susulan dalam Perintah Ex-Parte tersebut dibatalkan dengan sewajarnya;

[(2) All consequential directions and/or restrictions in the said Ex-Parte Order be discharged accordingly];

(3) Pendengaran permohonan Plaintif bagi hak penjagaan sementara didengar secara Inter-Parte, dan Defendan diberikan kebenaran untuk memfailkan afidavit jawapan beliau, jika ada;

[(3) The hearing of the Plaintiff's application for interim custody be heard Inter-Parte, and that the Defendant be granted leave to file her affidavit in reply, if any];

(4) Kos permohonan ini ditanggung oleh Plaintif;

[(4) The costs of this application be borne by the Plaintiff];

(5) Sebarang ganti rugi susulan (yang akan dinilai) dibayar kepada Respondent; dan

[(5) Any consequential damages (to be assessed) to be paid to the Respondent]; and

(6) Sebarang perintah lanjut dan/atau Iain-Iain relief yang difikirkan wajar dan sesuai oleh Mahkamah Yang Mulia ini.

[(6) Any further and/or order or other relief as this Honorable Court deems fit and proper to grant].

CAUSE PAPERS

[14] The relevant cause papers filed in this matter are:

(1) Enclosure 1:

Notice of application:

(i) Plaintiff's Originating Summons;

(ii) Plaintiffs Certificate of Urgency; and

(iii) Plaintiffs Notice of Application for interim custody, care and control of the Children.

Court's order:

(iv) High Court Order dated 13.09.2024; and

(v) High Court Interim Order dated 21.03.2025

Affidavits:

(vi) Plaintiffs Affidavit in Support;

(vii) Defendant's 'Afidavit Jawapan';

(viii) Plaintiffs 'Affidavit Jawapan';

(ix) Plaintiffs 'Affidavit Tambahan': and

(a) Enclosure 1

(b) Enclosure 3

(c) Enclosure 4

(d) Enclosure 5

(e) Enclosurel 1

(f) Enclosure 12

(g) Enclosure 13

(2) Enclosure 27:

Notice of application:

(i) Defendant's Notice of Application

(For a Declaration that the *Ex-Parte* Order dated 13.09.2024 is Null and Void or to Set Aside the *Ex-Parte* Order dated 13.09.2024.)

(ii) Affidavits:

(a) Defendant's 'Afidavit Sokongan';

(b) Plaintiff's 'Afidavit Jawapan';

(c) Defendant's 'Affidavit Balasan';

(d) Plaintiffs 'Afidavit Balasan'; and

(e) Defendant's 'Affidavit Balasan (2)'.

ISSUE

[15] Prior to this court considering the merits of encl 1, the respondent submitted encl 27 in an effort to annul the interim order that was decided before. This court opted to address both applications concurrently, as a favourable ruling for the defendant regarding the preliminary jurisdictional objection would render the encl 27 largely irrelevant and academic.

[16] The preliminary issue raised:

(a) first issue: whether this honourable court has the jurisdiction to hear the matter; and

(b) second issue: whether this honourable court should grant custody, care and control to the plaintiff in encl 1.

THE PLAINTIFFS ARGUMENTS

[17] At the outset, this issue of domicile is a non-starter before this honourable court as at all material times as the facts of the matter shows that:

(a) the decision to come and start life here in Malaysia was jointly made;

(b) the decision for the plaintiff to accept employment here in Malaysia and for the children to be educated at St Christopher's International School was jointly made;

(c) their home here in Malaysia was also jointly decided upon in which this is the residence where the children have lived in at all times since 2022, save and except for the four months when they were abducted by the defendant to Canada;

(d) the plaintiff is gainfully employed here at a renowned international school here in Penang, Malaysia;

(e) the children are enrolled here and have been studying at this school since 2022;

(f) the children have become a part of the community of the members and families of the St George's Church where they attend weekly church services, Sunday school, and other various church activities;

(g) the child Child B was even baptised here in St George's Church since 2022;

(h) the child, Child A's special condition was detected here in St Christopher's school and was even diagnosed here in Gleneagles Penang;

(i) the child now receives support at school vide a Shadow Aide that is employed by the plaintiff;

(j) a decision to procure the services of a shadow aide was jointly made where the defendant had even extensively interviewed the Shadow Aide;

(k) in the legal proceedings for the safe return of the children from Canada, the Supreme Court of British Columbia Canada had ORDERED that:

THIS COURT ORDERS AND DECLARES that:

1. The Respondent, Lori Ann Marie Guerrard, wrongfully removed the children from Malaysfa and brought them to Canada on or about May 7, 2024 and that she has Wrongfully kidnapped the children in Canada since that time pursuant to 77(1)(b) of theFamily Law Act

2. The children are not habitually rasident in Canada and that they are habitually resident in Malaysia pursuant to section 72(2) of the Family Law Act.

3. This court has no Jurisdiction to make orders regarding the guardianship or, parenting arrangements for or contact with the children pursuant to section 74(2) of the Family Law Act.

(l) the defendant DID NOT APPEAL to the said Canadian court's order; and

(m) since the children's return to Malaysia, they have been under the full-time care and supervision of the plaintiff where there have been no issues and the children are be able to continue with their daily routine and lives (schooling, therapy, church, Sunday schooling etc).

THE DEFENDANT'S ARGUMENTS

[18] Without prejudice to the submissions filed, the defendant's submits that the preliminary objection should be considered by this honourable court as to whether the parties to this action who are all foreign nationals can satisfy the requirements under s 3 of the Law Reform (Marriage and Divorce) Act 1976 as follows:

3(1) Application

Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia.

[19] The defendant respectfully submits that the plaintiff in this action is a Canadian, not a Malaysian citizen and has not/failed to show any evidence that he is domiciled in Malaysia except for a temporary work permit to work in Malaysia only. Clearly this is insufficient to show that the plaintiff intends to permanently reside in Malaysia.

[20] Whereas the defendant is also a Canadian citizen and lives in Canada, and both children who are the subject matter in this action were also born in Canada and are Canadian citizens.

[21] The family in this action does not have any matrimonial home in Malaysia, nor does it have a marriage registered in Malaysia.

[22] It must be emphasised by this court that the parties involved are not Malaysian citizen and are Canadian citizens.

[23] Evidence that the plaintiff did not show any intention to reside permanently in a country can be seen from the family's lifestyle after the

marriage. They were married in Bermuda (12 July 2014), and in the eight years of marriage, they have resided temporarily in the following countries:

(a) Thailand (August 2014-July 2016);

(b) Kuwait (August 2016-November 2016);

(c) Canada (Nov 2016-June 2017);

(d) China (August 2017-January 2020);

(e) Canada (Feb 2020-August 2021);

(f) Thailand (September 2021-April 2022);

(g) Canada (April 2022-October 2022); and

(h) and currently in Malaysia (since October 2023).

[24] The family's lifestyle history shows that the plaintiff has never resided in a country for more than three years, and this would also not qualify the plaintiff for permanent resident status in Malaysia. The lifestyle also showed that the family has returned to Canada more than three times, indicating that Canada is the place they will return to when there is no work abroad.

[25] Based on these facts, the defendant submits that this court does not have jurisdiction to hear and determine this matter. It was also raised that the plaintiffs failure to prove that he meets the definition of domicile further confirms the court's lack of jurisdiction in this case.

[26] Moreover, it was alleged by the defendant that as one of the tricks to prevent the defendant from residing in Malaysia, the plaintiff did not obtain any permit for the defendant's wife to reside with the family, especially the children. Therefore, the defendant submitted that the plaintiff has failed to appear before this court with clean hands, and the court will not extend assistance to a person who acts mala fide, the principle *ex turpi causa non oritur actio* (action does not arise from a dishonourable cause) applies.

[27] In conclusion, the preliminary objection raised by the defendant is that the plaintiff does not fall within the definition of 'domicile' as provided under s 3 of the Law Reform (Marriage and Divorce) Act 1976. Therefore, it is the defendant's contention that the plaintiff does not have sufficient legal standing to bring a claim under the provisions of the said Act.

ANALYSIS AND FINDINGS

Enclosure 1

A First issue: Whether this honourable court has the jurisdiction to hear the matter?

[28] Both, the plaintiff and the defendant seek to rely on the case of *Neduncheliyan Balasubramniam v Kohila a/p Shanmugam* [1997] 3 MLJ 768. They have laid down the factual matrix and issues and the differences between both cases as follows:

The present case	Neduncheliyan's case
Joint decision to come and start life in Malaysia where family moved to Malaysia	Only came to Malaysia for a short holiday from Thailand in 2022.
– no matrimonial property in any country – never had a home/property in Canada – the alleged residence of defendant is a place that the family nor the children have ever resided in and was only procured unilaterally by herself after her abduction of the children	There is a home in Canada which they live
Has a residence in Malaysia which family lives in, the Brezza Condominium in Tanjung Tokong, Penang, Malaysia	Stayed with parents in parents' house
Children are enrolled in school here	Children were only here for vacation
Has no properties in either UK nor Canada	Has a matrimonial home in Canada
Family moved to Malaysia where father has a social visit working visa which extends for the family pass and the children themselves are international students.	Has plans to return to Canada where there are return tickets to Canada purchased)

[29] The primary reference in *Neduncheliyan Balasubramniam* for the plaintiff to argue that this court has jurisdiction is on the basis of s 3 of the LRA, as ruled by the Court of Appeal in the following manner:

> (1) Section 3(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') states that 'Except as is otherwise expressly provided this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia'. The use of the word 'domicile', as opposed to physical presence, in the second limb of s 3(1) militates against the interpretation that 'all persons in Malaysia' must be read to mean all persons 'ordinarily resident' in Malaysia. In the present context, the expression 'ordinarily resident' is only relevant to the divorce

jurisdiction of the court. The ordinary meaning of the first limb of s 3(1) therefore is that the Act applies to all persons physically present in Malaysia unless the Act otherwise provides. Since the wife was not domiciled in Malaysia but was ordinarily resident in Canada, the second limb of s 3(1) did not apply to her. *But the wife and her children were physically present in Malaysia at all times material to this application. Therefore, they came within the first limb of s 3(1). Further, Pt VIII of the Act read with s 1(3) of the Guardianship of Infants Act 1961 and also art 121(1A) of the Federal Constitution was intended to coverall children who were physically present within the jurisdiction* who do not profess the religion of Islam. *Clearly, the Malaysian court did have jurisdiction and power to make any order required for the protection of the children in this case*.

[30] Upon reviewing all the facts of the case, this court determined that there were two crucial facts that both parties failed to address. Specifically, in the case of *Neduncheliyan Balasubramniam*, a notable distinction existed in the facts, as the applicant (wife) is Malaysian while the husband and children are Canadian. The choice of domicile and citizenship by the applicant emerged as the primary issue, whereas in the current case, all parties involved are Canadian. Additionally, in that case, there were hearing proceedings conducted or pending (divorce petition) when the application was filed, whereas in our case, no hearing proceedings took place or is pending in Malaysian court.

[31] In *Lee Chown Yee v Wong Mei Lin (P)* [2016] MLJU 661, on the issue of domicile and citizenship, the court held that:

Pihak responden isteri mengingatkan mahkamah bahawa dari segi undang-undang *konsep kerakyatan tidak boleh disalah ertikan dengan domisil memandangkan kedua-duanya adalah berbeza*. Dengan kata lain hanya domisil pempetisyen suami dikatakan telah berubah ke Indonesia dalam keadaan kerakyatan beliau masih kekal di Malaysia.

Bagi menguatkan hujah beliau, kes *Ang Gek Choo v Wong Tiew Yong* [1997] 3 MLJ 467 telah dirujuk untuk pertimbangan mahkamah ini di mana keputusannya adalah seperti berikut:

> *It is accepted law that the concept of nationality and the issue of domicile are two totally different concepts which deserve different and separate treatments*. A person may change his place of domicile but yet not be divested of his nationality. *It would be fallacious to think that the terms 'domicile' and 'residence' as being synonymous ... both the intention and the act of abandoning must be demonstrated to be unequivocal ...*

[32] Returning to the matter at hand, in reference to the case of *Neduncheliyan Balasubramniam*, the parties did not mention the case of *Herbert Thomas Small v Elizabeth Mary Small (Kerajaan Malaysia & Anor, interveners)* [2006] 6 MLJ 372, which explicitly outlined the true interpretation of the ruling in the case of *Neduncheliyan Balasubramniam*. This

court cites a portion of the explanation provided by Justice Faiza Tamby Chik as follows:

> In the Malaysian Court of Appeal case of *Neduncheliyan Balasubramaniam v Kohila a/p Shanmugam* [1997] 3 MLJ 768, the aforesaid principles were acknowledged and followed. It was categorically held by the court that where the infants and the father were Canadian citizens and the mother was a Malaysian citizen and permanent resident of Canada who was keeping the infants in Malaysia without the consent of the Canadian father, *the Malaysian court would not rule on custody, as this should be decided by the Canadian courts*. The welfare principle, that is that the paramount consideration when deciding cases on custody should be the welfare of the infant, was not ignored in this case; but as the children would come to no harm when returned to Canada. It was appropriate that the family return to Canada for the issue to be dealt with in the Canadian courts. Mahadev Shankar JCA in *Neduncheliyan* held at p 787 that:
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> > In the case of the children of foreign nationals, it should be self-evident that the duration of the protection afforded should only be for so long as the children can lawfully remain in the country. *In their case, we think it reasonable to state that where they are transient* visitors, *the court should only intervene if the harm to the children can be classified as a real and immediate danger to their physical well-being from anyone including their parents*.
>
> At p 790:
>
> > *Of course, the basic rule is that the paramount consideration is the well-being of the infants*. But where the children are Canadian nationals, the question is where do the children belong, where is the matrimonial establishment, and which is the proper court to decide the future of these nationals ...
>
> In the same, Mahadev Shankar JCA also observed at p 791 that:
>
> > The full text of the report, *In re L* makes it clear that the words 'kidnapping' and 'abduction' in some cases has acquired a technical meaning which does not necessarily involved coercion. *Both the husband and the wife have an equal right to the custody of the children. Therefore, both have an egual obligation to ensure that nothing is unilaterally done which has the practical effect of depriving the other of the society of the children*. B (ie the father) is a Canadian. He has no right of residence here. To say he can come here and visit his children at will is impractical to the point of being farcical.
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> The learned Court of Appeal judge then concluded that: (at p 792):
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> > *For all the reasons aforesaid, we hereby set aside the order of the High Court but we do not make any concluded view as to which parent should have permanent exclusive custody of the children. This is a matter for the Canadian courts. All we are ordering is that the children should be delivered into the care and custody of B their father* (ie who had not consented to the other spouse taking the children) who shall be at liberty to remove them to Canada to the matrimonial home at 100 Dandalk Drive, Apartment 914, Scarborough, Ontario Canada.

In coming to conclusions, the Court of Appeal relied heavily on the English cases of

In re T (Infants) [1968] 1 Ch 704 and *In re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250, aforesaid. The court also cited *G v G (Minors) (Abduction)* Vol 2 (1991) Family Law Review observing:

> a comment by the Nigel Lowe (in *G v G*) which we think correctly states the position for abduction cases from 'non-convention countries; ie:
>
> > *... if the child's settled home was in that country, a peremptory order for the return of the child will be ordered unless there is some prima facie evidence either that the child would be harmed or that the host country would not apply the paramountcy of the child's welfare principle*.

[33] It is evident in the aforementioned case that the Court of Appeal determined that sole custody and control cannot be awarded by the Malaysian court, as this matter falls under the jurisdiction of the Canadian court.

[34] Given that there are no divorce proceedings pending in this court and that the matter does not pertain to citizenship issues, but solely to the welfare of the children, this court will refrain from making a jurisdictional decision based on domicile. Instead, it will base its decision on the physical presence of the children currently residing in Malaysia, in accordance with s 3(1) of the LRA and s 1(3) of the Guardianship of Infants Act 1961, as well as art 121(1A) of the Federal Constitution, as established in the case of *Neduncheliyan Balasubramniam*.

[35] This court's order is given based on the welfare of the children by considering the fact of the suitability of the parents for the time being while they are in Malaysia. There is a rebuttable presumption that it is for the good of a child below the age of seven years to be with his mother. In the case of *W v H* [1987] 2 MLJ 235 at p 238, Shankar J (as he then was) held that:

> [36] The paramount consideration is always the welfare of the child and *there is a rebuttable presumption* that it is for the good of a child below the age of seven years to be with his mother.

[36] As guided by the case of *Neduncheliyan Balasubramniam*. This court is not making any concluded decision as to which parent should have permanent exclusive custody of the children. This is a matter for the Canadian courts.

[37] Both the husband and wife possess an equal right to custody of their children. Consequently, both parties share an equal responsibility to prevent any unilateral actions that would effectively deprive the other of the children's companionship.

[38] Reference was made also to s 5 of the Guardianship of Infants Act 1961 ('the Guardianship of Infants Act'), which reads:

A Section 5 — Equality of parental rights

(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.

B

[39] Although both parties have equal guardianship, but the children should be delivered into the care and custody of the plaintiff. However, the defendant will be entitled to reasonable access to the children.

C

[40] For this reason alone, it is sufficient for this court to set aside the ex parte order obtained because the complete facts are now before the court based on the defendant's affidavit which was not previously before the court for consideration.

D

[41] This court has the right to set aside or amend the ex parte order obtained before. The power of this court is as provided in the case of *Kerajaan Malaysia v Gold Bridge Engineering & Construction Sdn Bhd* [2022] MLJU 3075, held:

E

[9] In general, an ex parte order issued by the court is not a final order. It can still be amended or overturned during the trial. The power to set aside an ex parte order is expressly provided for under O 32 r 6 of the Rules of Court 2012 (TAB 1) provides that the court may set aside an order made ex parte. Order 32 r 6 reads:

F

The court may set aside an order made ex parte

[10] In *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448, held that:

The judge was not functus officio because his order was not a final order as it was made ex parte. Under O 28 r 4(1), the ex parte order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit and, under O 32 r 6, such an order may be set aside by the court. An application to set aside an ex parte order is not an appeal which requires a court of superior jurisdiction to deal with it.

G

H [11] In the case of *Seema Development Sdn Bhd v Mah Kim Chye* [2014] 2 MLJ 425; [2013] 6 MLRH 566, the court referred to the case of *Munusamy a/l Karuppiah (sole proprietor of MNN Consultancy Services, a firm) v Sang Lee Co Sdn Bhd & Ors* [2010] 2 MLJ 661; [2009] 4 MLRA 36, in which case it was held that:

I (d) O32 r 6 of the RHC states that the court may set aside an order made ex parte. This rule is a good piece of legislation because it protects the basic right of the litigants in that the party who has not been heard may apply to the court to have that order discharged forthwith (*Boyle v Sacker* [1888] 39 Ch D 249, at p 251; *Noel v Becker* [1971] 1 WLR 355 and *Tan Poey Kheng v Ma Peng Kiat* [1983] 2 MLRH 296) ...

Second issue: Whether this honourable court should grant custody, care and control to the plaintiff in encl 1?

[42] In furtherance to the above, this court agrees with the reasons stated by the plaintiff's counsel as it fulfils the condition under s 88 of the LRA and as seen in the case of *Khoo Cheng Nee v Lubin Chiew Pau Sing* [1996] 4 MLJ 171, where it was held:

> To summarise, *for guidance in simitar applications, the court will normally favour the parent who will best maintain stability in the child's surroundings*. There is no set standard as to what constitutes 'stability', but a judge looks for continuity in a child's life. *To the degree possible, a judge will try to maintain continuity in, for example, a child's school, community and religious ties*.
>
> *A court gives the 'best interests of the welfare' of the child the highest priority. What the best interests of the child are in a given situation depends on many factors, including*:
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> (1) the child's age, gender, mental and physical health;
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> (2) mental and physical health of the parents;
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> (3) lifestyle and other social factors of the parents, including whether the child is exposed, for example, to second-hand smoke and whether there is any history of child abuse;
>
> (4) the love and emotional ties between the parent and the child, as well as the parent's ability to give the child guidance;
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> (5) the parent's ability to provide the child with food, shelter, clothing and medical care;
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> (6) the child's established living pattern (school, home, community, religious institution);
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> (7) the quality of the school — particularly important when one parent wishes to move; and
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> (8) the ability and willingness of the parent to foster healthy communication and contact between the child and the other parent.

[43] Based on the facts at hand, and with regard to the undesirability of disturbing the life of a child by changes of custody, this court recognises the consideration of the welfare of the children to be best placed here with the plaintiff in Penang where:

(a) they have an established home here where they have lived in since 2022 and are accustomed to the condominium, the management staff, and its surrounding facilities and features;

(b) the children both attend school at SCIPS where they have formed bonds, friendships, acquaintances with their respective classmates, schoolmates,

teachers and staffs, and have developed a sense of belonging over the years of studying together here;

(c) it was here in SCIPS that Miranda's condition was detected here and special arrangements are currently in place to assist and enable Child A to develop and progress in her daily life with this condition;

(d) with Child A's sensory processing disorder, it is imperative that Child A be given proper support and a favourable/suitable environment so as to help Child A with overcoming this condition;

(e) here, with the therapy, the familiarity of surroundings and people, the assistance of the Shadow Aide, not only has Child A been able to handle things better now, she is even making incredible progress with her school and her interactions;

(f) here the children have a proper and healthy regulated daily routine with the plaintiff such as proper meals, hygiene care and sleeping times;

(g) the children go to school with the plaintiff where they attend classes, activities, extra co-curriculum and the plaintiff works and is able to be close with the children on a daily basis, where at the end of school, they would then return home together with the plaintiff;

(h) here the children are provided with insurance coverage from the plaintiff's employment;

(i) here the children have become a part of the community of the members and families of the St George's Church where they attend weekly church services, Sunday school, and other various church activities;

(j) here, the plaintiff is gainfully employed and has been taking care of the children's needs at all material times; and

(k) the plaintiff is able to care for the children as he has done so when they first came to Penang, and even now, since the children's return from their abduction up till to-date.

[44] In the case of *Teh Chern Zhe lwn Alisha Gilbert Sulin* [2024] MLJU 2355; [2024] CLJU 2058, the court held that:

> [17] Returning to the issue of who is entitled to the interim right of custody, control and preservation, this court is guided by s 88 of the LRA as follows:
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> Section 88 Power of the Court to make an order for custody
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> (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association

the objects of which include child welfare or to any other suitable person.

(2) In deciding in whose custody, a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

[45] The decision of the Federal Court in *Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585; [2016] 3 CLJ 505 which decided and explained the application of s 88 of the LRA as follows:

It is settled law that the paramount consideration in determining the custody of a child is the child's welfare. The wordings of s 88(3) of the LRA pronounce this consideration in clear terms.

[19] The term 'first and paramount consideration' is not specifically stated in the LRA. However there is a relevant guideline as in the case of *J and Another v C and Others* [1970] AC 668, Lord Mac Dermott explained:

> I think it connotes a process whereby, when all relevant facts, relationship claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interest of the children's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.

[46] This guidance is also in line with the provisions in s 11 of the Guardianship of Infants Act 1961 (Act 351) as follows:

Section 11

The Court of a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[47] Returning to the facts of this case, based on the facts of the case, these children are minor. It is a legal basis that the mother will have priority in the custody of the minor, unless there are circumstances where the mother is proven unfit or unfit for marital child custody this court is guided by the case of *Ang Paik Leng lwn Tan Kean Leong* [2022] MLJU 2615; [2022] CLJU 2397.

[48] In the case of *Winnie Ong Beng Cheen v Cheah Chyuan Yong & Anor (Lee Lean Hiap, third party)* [2025] MLJU 550; [2025] CLJU 461, held that:

> [42] Based on the facts of this case, the court is satisfied that limited access to the document can be stated in the order in accordance with s 89(2) of the Law Reform (Marriage and Divorce) Act 1976 provides that an order for custody may give a parent deprived of custody, the right of access to the child at such times and with such frequency as the court may consider reasonable. When access is granted to one parent, the effect is that the law recognises that the children should have the society or the company of their parent who does not have custody.
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> [43] The section expressly acknowledges the parental right to reach out to their children that the court grants to one, custody and to the other the right of access. The right of access is for the mutual benefit of both, the parent whom is deprived of the custody and for the children.
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> [44] In the case of *Ang Sae Ming v Chow Foong Yien* [2018] CLJU 1730, the court held that:
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> > [15] It is the court's unfettered discretion when granting access to subject it to duration of visits which ultimately would largely depend upon the facts and circumstances of each particular case. In *Loh Kon Fab v Lee Moy* [1976] 2 MLJ 88; [1975] CLJU 89 (FC), it was ordered that 'unrestricted right of access' be granted. While in the case of *Re KO (an infant)* [1990] 1 MLJ 494; [1990] CLJU 8, a general order of 'reasonable access' was granted. In *Chan Bee Yen v Yap Chee keong* [1989] 1 MLJ 370; [1988] CLJU 212, a more specific order of 'daily access for certain hours' was made by the court. In *Sivajothi a/p Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48; [2000] 3 CLJ 175; [2000] 2 AMR 2072, an order may also specify 'the period of access' during the children's school holidays in addition to weekly accesses. In *T v T,* Gill J, said that like custody orders, orders for access to infants can be varied if there is change in circumstances. To restrict access, it must be shown to the satisfaction of the court that the visitation granted have a detrimental effect on the infant.
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> [45] In the case of *Foo Kok Soon v Leony Rosalina* [1998] MLJU 61; [1998] 4 CLJ Supp 289; [1998] 4 BLJ 289, the court held that:
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> > Right of Access
> >
> > After a divorce the paramount concern of the court is to make such orders as relate to the custody of and access to the children. It is my judgment that when access is granted to one parent the effect is that the law recognises that the children should have the society or the company of their parent who does not have custody. Section 89(2) of the Law Reform (Marriage and Divorce) Act

1976 (the Act) reads:

> (2) Without prejudice to the generality of sub-section (1), an order for custody may
>
> (d) give a parent deprived of custody ... the right of access to the child at such times and with such frequency as the court may consider reasonable; or
>
> It is in recognition of the parental right to reach out to their children that the court grants to one, custody and to the other the right of access. This is a statutory right bestowed in this case upon the defendant and no wicked manipulation, nor monumental hatred can deprive the mother of this right of access. The right of access is for the mutual benefit of both, the parent deprived of custody, and for the children. At least by seeing the children, on the days and times provided by the court, the parent's anguish, and longing and desire to see the children without fear of punitive sanctions and injunctions, are fulfilled. On the other hand, such a parent is also in a position to see if the parent having the custody provides for the children and treats them fairly. The children too have someone to turn to, and to be able to relate to that parent if they are being ill-treated. Such a parent can easily ascertain if there has been any material change in the circumstances

[49] In *Celvambigai a/p S Thirucelvam v Pandian a/l Subramaniam* [2015] MLJU 2093; [2015] 6 CLJ 225, held that:

> [57] There is no doubt that children must be allowed to spend quality time with both the parents, and the matter assumes heightened importance when the parents have gone separate ways in a pending divorce proceeding that would culminate with an order for dissolution of the marriage. Reasonable access is the norm where the other parent has custody of the children. It must not be forgotten that 'access is the basic right of the child rather than the parent' as was highlighted by Her Ladyship Zainun Ali J (now FCJ) in *Leong Sam Moy v Low Chee Thiam* [1996] MLJU 640; [1997] 2 CLJ Supp 212 at p 214.

[50] In *Foo Kok Soon v Leony Rosalina* [1998] MLJU 61; [1998] 4 CLJ Supp 289, held:

> When access is granted to one parent, the effect is that the law recognises that the children should have the society or the company of their parent who does not have custody. It is in recognition of the parental right to reach out to their children that the court grants to one, custody and to the other the right of access. The right of access is for the mutual benefit of both, the parent deprived of custody and for the children.

[51] In *Nanthini a/p Subramaniam lwn Eric Steven a/l Mathalai Muthu* [2025] MLJU 772, held:

A [34] Berlandaskan fakta-fakta di atas, mahkamah percaya bahawa defendan mampu memberi kenak-kanak tersebut satu keadaan dan suasana yang kondusif dan stabil ('provide a stable condusive environment') bagi tumbesar anak-anak responden yang sebaiknya.

B [35] Atas dasar di atas, responden adalah lebih sesuai untuk diberikan hak jagaan kanak-kanak tersebut jika berbanding dengan cara dan gaya hidup pemohon. Ini selaras dengan penghakiman *Ong Kean Leong v Tan Siew Hwa and Lim Toh Seng (Third Party)* [2010] MLJU 1146; [2010] 1 LNS 1158 di mana mahkamah telah berputus setelah membuat bandingan keadaan kedua-dua pihak:

C > Between the 2 parties, I believe that the plaintiff husband is a far better parent to be given custody of the children. He is able to provide a more stable environment and proper home for the children as opposed to the defendant wife. He now lives with his own parents. His parents and Anita, who had all these years cared for and brought up his children, will be able to provide consistent and good care for the children. This is for the welfare and in the best interests of the children.

D [36] Di dalam keadaan ini, mahkamah berpendapat bahawa kepentingan dan kebajikan serta masa hadapan kanak-kanak tersebut adalah jauh lebih terjamin sekiranya defendan diberikan hak jagaan, kawalan dan pemeliharaan tunggal ('sole custody, care and control') terhadap kanak-kanak tersebut di mana masa akses adalah liberal dan/atau tidak terhad diberikan kepada pemohon.

E **[52]** The legal presumption under s 88(3) of the LRA 1976 clearly prioritises the mother in custody matters, unless there is strong evidence to the contrary. In this case, it is established that Child A who is over the age of seven years old and rebuttable presumption does not apply.

F **[53]** Child B, whom is currently four years old, the court found that the plaintiff had successfully proven that the plaintiff was best suited to care for Child B. Both Child A and Child B would be best placed with the care and custody of the plaintiff as the Court shall have regard to the undesirability of disturbing the life of a child by changes of custody and considering that they have been well looked after by their father and also taking into account the defendant's situation of not having a place to live in Malaysia and having any employment here.

G **[54]** In *Valarmathy a/p Devarajoo v Selvaveeran a/l Manokaran* [2021] MLJU 1098, held:

H > [15] It is trite that the statutory presumption under s 88(3) LRA is rebuttable, whereby evidence can be adduced to deny the said presumption. If successful, s 88(3) of the LRA do not apply in the circumstances of the case. In *Amar Kaur a/p Ram Singh v Najar Singh Sagar Singh* [1992] 2 CLJ 807, Abdul Malek Ahmad J said:

I > ... I had dismissed the plaintiff/applicant's application for custody of her six children, who had all along been staying with the defendant/respondent, as I had

> doubts in the light of the facts of this particular case as to whether the plaintiff/applicant was in a position to look after herself properly, let alone look after the six children, who had also expressed their desire to continue staying with their father who, in the last two years after their mother had left the matrimonial home, appeared to have taken good care of them judging from their appearance in my chambers and their school and probation reports ...

[55] In *Melissa Marie Albert v Malcolm Fernandez and another appeal* [2019] 2 MLJ 290; [2019] 8 CLJ 181, Court of Appeal, it reaffirmed the legal position in that:

> ... of the view that the care and custody of a child below the age of seven years old would naturally incline to the mother unless the presumption under s 88(3) of the LRA is rebutted. Strong grounds are needed to rebut this presumption. In short, prime facie the care and custody of a child of the tender age should remain with the mother, and strong grounds are required to justify depriving the mother of such care and custody.

[56] In *Thanaletchimy a/p Batamallai v Vijaya Kumar a/l Kassinathan* [2018] 4 MLJ 557; [2018] 8 CLJ 24, Umi Kalthum JCA states that:

> Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 presumes, albeit rebuttable, that it is in the best interest of the child aged seven years and below to be under the care and custody of the mother unless it could be proven that the child would be better off with someone else. Strong grounds are needed to rebut this presumption.

[57] As above-mentioned in para 37, guided by the case of *Neduncheliyan Balasubramniam*. This court is not making any concluded decision or ruling as whether the plaintiff or the defendant should have permanent exclusive custody of the children. This is a matter for the Canadian courts.

OTHER ISSUES RAISED

[58] The defendant raised that order dated 13 September 2024 was irregular on the basis that the ex parte that was entered against the defendant on an ex parte basis without an inter parte hearing being conducted within 14 days, as provided under O 29 r 1(2BA) of the Rules of Court 2012 ('the ROC 2012'):

> O 29 r 1(2BA) of the Rules of Court 2012
>
> An ex parte interim injunction must be served within seven days of the date of the order, and the Court when granting the order must fix a date to hear the application inter partes within fourteen days from the date of the order.

[59] The defendant also submits that it is also clearly stated under O 29 r 1(2B) of the Rules of Court 2012 that an interim injunction obtained on an

ex parte basis shall automatically lapse within 21 days from the date the order was granted:

> O 29 r 1(2B) of the Rules of Court 2012
>
> Unless earlier revoked or set aside, an interim injunction obtained on an ex parte application shall automatically lapse twenty-one days from the date it was granted.

[60] The defendant also submitted that the plaintiff's excuse is merely that the injunctions obtained by the plaintiff were under O 32 r 6 of the Rules of Court 2012, and not under O 29 of the same. This is unacceptable. By referring to the prayers sought by the plaintiff in encl 1, it is clear that injunctions were indeed made against the defendant.

[61] In this case, the argument that the court order granted was injunctive under O 29 of the ROC 2012 is incorrect. This is because the injunction granted was not an order under O 29 of the ROC 2012, but an order under s 89 of the LRA 1976 which allows the court to impose conditions on the access. The said injunction is not subject to the conditions of the order granted under O 29 of the ROC 2012 but the order allowed under s 89 of the LRA 1976 which reads as follows:

> 89 Orders subject to conditions
>
> (1) An order for custody may be made subject to such conditions as the court may think fit to impose, and subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.

[62] On top of that, this issue can no longer be raised when an interim order has been recorded by agreement by both parties, so the issue of whether it is an injunction obtained under O 29 of the ROC 2012 has become no longer relevant.

[63] The defendant also submits that there is no provision under the Law Reform (Marriage and Divorce) Act 1976 that allows an interim order to be entered on an ex parte basis without the requirement for a hearing to be conducted within the timeframe stipulated under the ROC 2012. Additionally, according to the Divorce and Matrimonial Proceedings Rules 1980, r 7(1):

> Divorce and Matrimonial Proceedings Rules 1980, Rule 7(1) Cause to be begun by petition.

[64] However, the defendant is reminded that there are other relevant regulations under Matrimonial Proceedings Rules 1980, that must be referred to and read together as follows:

(a) r 3 Application of other rules:

(1) Subject to these Rules and to any other written law, the Subordinate Courts Rules 1980 and the Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceeding spending in the Sessions Court and in the High Court respectively.

(2) For the purposes of paragraph (1), any provision of these Rules authorising or requiring anything to be done in matrimonial proceedings shall be treated as if it were, in the case or proceedings pending in the High Court, a provision of the Rules of the High Court 1980.

(b) r 104 Present practice:

Where no other provision is made by any written law or by these Rules, the present practice in Malaysia shall remain in force.

(1) Non-compliance with these Rules or any rule of practice in force shall not render the proceedings void unless the Court shall so order but the Court may of its own motion or on application of any party set aside any proceedings wholly or in part as irregular or order amendment on such terms as may be just.

[65] Considering the totality of the facts, there is no ambiguity or prejudice against the defendant, the defendant and her counsel have effectively answered each affidavit in this application and have vigorously contested the plaintiffs affidavit.

[66] The r 104 of the Matrimonial Proceedings Rules 1980 must be read together with O 92 r 3B of the ROC 2012 which states as follows:

3B Practice directions (O 92 r 3B)

The Chief Judge after consulting the Chief Justice may issue such practice directions as may be necessary for the better carrying out or giving effect to the provisions of these Rules.

[67] Therefore, based on the facts of the case and the fact that children are considered to be well-rooted in Malaysia since 2022. In actual fact legally residing here for the long term since 2022. Even the Supreme Court of British Columbia, Canada had ordered and declared that:

2. The children are not habitually resident in Canada and that they are habitually resident in Malaysia pursuant to section 72(2) of the Family Law Act.

[68] In a nut shell, this court hereby decides as follows:

(a) bahawa pemeliharaan dan kawalan, kanak-kanak yang bernama Child A, umur 7 tahun yang dilahirkan pada 08.04.2017 diberikan kepada Plaintif selama mana mereka berada di Malaysia;

[(a) that care and control of the child named Child A, aged 7 years, born on 08.04.2017, is granted to the plaintiff for as long as they are in Malaysia];

(b) bahawa pemeliharaan dan kawalan kanak-kanak yang bernama Child B, umur 4 tahun yang dilahirkan pada 06.08.2020 diberikan kepada Plaintif selama mana mereka berada di Malaysia sahaja;

[(b) that care and control of the child named Child B, aged 4 years born on 06.08.2020 be granted to the plaintiff as long as they are in Malaysia];

(c) bahawa Defendan dilarang untuk menggangu hak Plaintif dalam pemeliharaan dan kawalan kanak-kanak, Child A and Child B selama mana mereka berada di Malaysia;

[(c) that the defendant is prohibited from interfering with the Plaintiffs right to the care and control of the children, Child A and Child B for as long as they are in Malaysia;]

(d) bahawa Defendan diberikan hak akses dari pukul 4:00PM Jumaat hingga 9.45AM Ahad dimana Defendan adalah untuk mengambil kanak- kanak dari Sekolah Saint Christopher's International School of Penang di 10, Jalan Nunn, 10350 Georgetown, Pulau Pinang dan adalah untuk mengembalikan kanak-kanak tersebut kepada Plaintif pada masa yang ditetapkan di St. George's Church di No. 1, Lebuh Farquhar 10200;

[(d) that the Defendant is granted access from 4pm Friday to 9.45 AM Sunday where the Defendant is to take the children from Saint Christopher's International School of Penang at 10, Jalan Nunn, 10350 Georgetown, Pulau Pinang and is to return the children to the plaintiff at the appointed time at St. George's Church at No. 1, Lebuh Farquhar 10200;]

(e) Responden dibenarkan untuk mempunyai akses maya kepada Kanak-kanak — Dalam talian, panggilan video atau telefon setiap hari Selasa dan Khamis sehingga 1 jam antara 7 malam dan 8 malam. Plaintif tidak boleh menghalang atau menghalang akses ini dalam apa jua cara dan hendaklah memastikan ia dipermudahkan dengan lancar, tanpa sebarang halangan atau gangguan.

[(e) The Respondent is allowed to have virtual access to the Children - Online, video or phone-call every Tuesday and Thursday for up to 1 hour between 7PM and 8PM The Plaintiff must not obstruct or hinder this access in any way and shall ensure that it is facilitated smoothly, without any interruption or interference;]

(f) Responden dihalang daripada membawa atau mengeluarkan Child A and Child B daripada Malaysia tanpa kebenaran bertulis daripada Plaintif; dan

[(f) Respondent is prevented from bringing or removing out Child A and Child B from Malaysia without the written consent from the Plaintiff;

(g) dengan kebebasan pihak-pihak untuk memohon; dan [(g)With the liberty of parties to apply ; and]

tiada perintah atas kos.

[(h) no order as to costs.]

Enclosure 27

[69] Given that encl 1 has been decided inter parte, the application for encl 27 to annul and set aside the ex parte order granted has become academic and redundant.

[70] In *Raphel Pura v Insas Sdn Bhd & Anor* [2003] 1 MLJ 513, the Federal Court held that:

> In *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257, Edgar Joseph Jr FCJ, said at p 264:
>
> > Having said that, this court does not sit to decide abstract or academic or hypothetical questions of law regarding which the parties are not in dispute. Thus, in *Ainsbury v Millington* [1987] 1 All ER 929, Lord Bridge said this (at pp 930–931):
> >
> > > It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.
>
> In *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469, Viscount Simon LC, speaking for the House of Lords, said (at p 470):
>
> > I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing list between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.
>
> In *Ainsbury v Millington* [1987] 1 All ER 929, Lord Bridge, having cited the passage by Viscount Simon LC above, said at pp 930–931:
>
> > It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.
>
> In *Loknath Padhan v Birendra Kumar* AIR 1974 SC 505, the Supreme Court of India held:
>
> > It is a well settled practice recognized and followed in India that if an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be a waste of public time and indeed not a proper exercise of authority for the court to engage itself in deciding it.
>
> Justice Bagwati, in his judgment, said;
>
> > ... it would be clearly futile and meaningless for the court to decide an academic question, the answer to which would not affect the position of one party or the

A other. The court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the court would properly decline to do so.

B

[71] The court has determined that it is no longer necessary to make a ruling on the application filed in encl 27, given that both parties have thoroughly articulated and presented the substantive arguments related to the application as detailed in encl 1. Consequently, encl 27 is struck out with no order as to
C costs.

CONCLUSION

[72] There are also other objections which this court considers to be more of
D a technical issue which does not prejudice the parties and the court finds that the defects do not touch upon the 'mandatory non-compliance' either in the LRA or the ROC 2012. All those objections are dismissed.

[73] In the court's analysis of the facts pertaining to this case, from any
E standpoint, be it factual, jurisprudence, legal or humanitarian, this case poses considerable difficulties with far-reaching consequences, not just for the parties directly involved in these issues but also for others who will be influenced by the legal precedent set by this decision.

F **[74]** As a result, this matter needs to be approached with careful consideration. The court concludes that the decisions stated in para 68 above are justified.

Order accordingly.
G

Reported by Nabilah Syahida Abdullah Salleh

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